Supreme Court, U.S.
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No. 92-965

In the Supreme Court of the United States

OCTOBER TERM, 1992

BERNARD GELB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court violated the Victim and Witness Protection Act, 18 U.S.C. 3663, 3664, by ordering petitioner to pay $5 million in restitution.

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OPINIONS BELOW

The court of appeals' summary order (Pet. App. 8a-11a) affirming the district court's order of restitution is unpublished. The court of appeals' earlier opinions remanding the case for resentencing and affirming petitioner's convictions are published at 944 F.2d 52 and 881 F.2d 1155, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1992. The petition for a writ of certiorari was filed on December 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c), one count of mail fraud, in violation of 18 U.S.C. 1341, 44 counts of bribery, in violation of 18 U.S.C. 201(b)(1)(C), and three counts of willfully making and subscribing to false corporate tax returns, in violation of 26 U.S.C. 7206(1). On the RICO count, he was sentenced to 13 years' imprisonment and a $25,000 fine, and he was ordered to pay $5 million in restitution; on the mail-fraud count, he was sentenced to a concurrent five-year term of imprisonment and a cumulative $1,000 fine; on six of the bribery counts, he was sentenced to concurrent 13-year terms of imprisonment; on each of the other 38 bribery counts, he was sentenced to concurrent five-year terms of probation, to commence upon completion of his imprisonment; on one of the tax counts, he was sentenced to a concurrent five-year term of imprisonment and a cumulative $75,000 fine; and on each of the other two tax counts, he was sentenced to concurrent five-year terms of probation, to commence upon completion of his imprisonment. See *United States* v. *Gelb*, 944 F.2d 52, 53-54 (2d Cir. 1991).

On direct appeal, the court of appeals affirmed his convictions. *United States* v. *Gelb*, 881 F.2d 1155 (2d Cir.), cert. denied, 493 U.S. 994 (1989). The district court subsequently denied petitioner's motion under 28 U.S.C. 2255 and Fed. R. Crim. P. 32 and 35 to correct his sentence. On appeal from that ruling, the court of appeals affirmed his sentences on the RICO, mail-fraud, and bribery convictions, vacated the tax sentences for resentencing, and vacated the restitution award with instructions for the district court on remand to "expressly con-

sider" the factors recited in 18 U.S.C. 3664(a) that bear on the court's determination of the amount of restitution. 944 F.2d at 60. On remand, the district court expressly considered those factors and reentered the $5 million restitution order. Pet. App. 2a, 6a-7a. The court of appeals affirmed. *Id.* at 8a-11a.

1. The facts of petitioner's offenses are recited in the court of appeals' opinion affirming his convictions, see 881 F.2d at 1157-1159. Petitioner managed EDP Medical Computer Systems, Inc. (EDP), which was founded in 1969 and became a successful mass-mailing and bill-collection agency in Queens, New York. EDP engaged in magazine subscription solicitations, collections for a number of New York City agencies, and data processing and billing for the Bronx-Lebanon Hospital. EDP's business called for it to send large amounts of mail: some of the company's mailings contained up to a million pieces. From 1975 to 1978, petitioner avoided paying postage on a portion of EDP's huge volume of mail by burying in sacks or hampers brought to the post office large quantities of unmetered mail under a few layers of metered mail, giving the false impression that postage had been paid on the entire batch. In 1978, petitioner began using two stolen Pitney-Bowes postage meters that had been altered to indicate falsely that postage had been paid on mail passed through them. At the same time, EDP ran enough mail through its legal postage meters to create the impression that all mail sent from EDP was in compliance with Postal Service regulations on the use of postage meters whereas, in fact, most of the mail was being passed through the altered stolen meters. Through associates, petitioner paid bribes to postal employees to ensure that the false-metering scheme would remain undetected. Petitioner also knowingly caused the filing of a number of false corporate tax returns on which EDP claimed as tax deductions the cost of postage

stamped from the illicit meters, although the amounts claimed did not represent the true postage expenses of the corporation.

2. In July 1987, a grand jury returned a 78-count indictment charging petitioner with various offenses. Petitioner was convicted after a jury trial in late 1988. The sentence imposed included the order that petitioner pay $5 million in restitution to the Postal Service for the loss caused by the RICO offense. The restitution amount was based on an unrebutted calculation from evidence showing the volume of illicit mailings that were made by one EDP subsidiary between 1977 and 1983. In light of the evidence, the district court considered the $5 million assessment of the loss to be "probably on the low side." See 944 F.2d at 56.[1]

In reviewing petitioner's initial challenge to the restitution award, the court of appeals decided that "there was a sufficient basis on this record for the district court's finding" concerning the amount of loss caused by the RICO offense. 944 F.2d at 56. However, the court of appeals found that there was no indication in the record that the district court had considered all the factors identified in the VWPA that should bear on the amount of restitution ordered: "the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents,

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[1] Pursuant to the provisions of the Victim and Witness Protection Act (VWPA), 18 U.S.C. 3663(f), restitution is payable immediately (unless the judge provides otherwise) and must be completed by the end of petitioner's period of probation. Thus, in petitioner's case, his order of restitution would expire approximately 18 years after he began to serve his term of imprisonment (because his concurrent five-year terms of probation would begin to run after he completed his 13-year concurrent prison terms for the RICO and bribery offenses).

and such other factors as the court deems appropriate." 18 U.S.C. 3664(a). Relying on prior circuit precedent, the court observed that "there is no requirement that specific findings be made on each factor because 'such fact finding would unnecessarily encumber a sentencing proceeding.'" 944 F.2d at 56, quoting *United States* v. *Atkinson*, 788 F.2d 900, 902 (2d Cir. 1986). The court of appeals stated that "on remand, the district judge need only 'consider' the listed factors * * * and a statement that the district judge has considered the statutory factors is sufficient." 944 F.2d at 56-57.

3. On remand, the district judge "expressly stated that he had considered 'all four factors of concern under the statute' and concluded that he would leave undisturbed the $5 million restitution obligation." Pet. App. 9a. The court acknowledged that petitioner had presented some evidence concerning the financial needs of his dependents and his ability to pay. However, the court observed that the record revealed the existence of "business, * * * real estate, and * * * other holdings," that had "never been clearly identified and valued by [petitioner]." *Id.* at 6a. As a result, the court was "unable to establish a restitution figure that is realistic." The court concluded that it was "compelled to let the restitution stand as originally computed." *Ibid.*

4. The court of appeals affirmed the restitution order. Pet. App. 8a-11a. It rejected petitioner's argument that the amount of the award was excessive in light of his ability to pay. Following its own precedent, the court observed that "a defendant may be ordered to repay the full amount of the loss caused by his criminal conduct notwithstanding his present indigency." *Id.* at 10a, citing *United States* v. *Atkinson*, 788 F.2d at 904. Since the district judge had "considered the statutory factors and nonetheless continues to believe that the $5 million award is appropriate," the court of appeals found "no

basis for saying that his amended sentence is invalid." Pet. App. 10a. That was especially true, stated the court, because petitioner himself was responsible for the "difficulty in selecting some arguably more appropriate figure" by creating uncertainties "concerning the true state of his current finances." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 16-25) that the courts of appeals do not agree on whether a district court must make "specific findings of fact" concerning the statutory factors that courts must consider—including the defendant's ability to pay—in fixing the amount of restitution. See 18 U.S.C. 3664(a). Although some courts of appeals require specific fact-finding and others do not, it is not necessary for this Court to impose a uniform rule in this area.

Section 3664 of the VWPA states that a sentencing court "shall consider" specified factors in determining whether to order restitution and in what amount (Section 3664(a)), and shall resolve any dispute over the amount of restitution "by the preponderance of the evidence" (Section 3664(d)). The district court's award of restitution is reviewed for abuse of discretion, see, *e.g.*, *United States* v. *Teehee*, 893 F.2d 271, 273-274 (10th Cir. 1990); *United States* v. *Bruchey*, 810 F.2d 456, 458 (4th Cir. 1987); *United States* v. *Carson*, 669 F.2d 216, 217 (5th Cir. 1982). In light of the absence of any expess statutory requirement that the court make findings of fact concerning the factors to be considered under Section 3664(a), some courts of appeals uphold an award of restitution if the record indicates that the judge has "considered" the requisite factors, and that there is sufficient evidence to support the award. See, *e.g.*, *United States* v. *Atkinson*, 788 F.2d at 902; *United States* v. *Patterson*, 837 F.2d 182, 183-184 (5th Cir. 1988); *United*

States v. *Hairston*, 888 F.2d 1349, 1352-1353 (11th Cir. 1989); *United States* v. *Purther*, 823 F.2d 965, 968-970 (6th Cir. 1987); *United States* v. *Cannizzaro*, 871 F.2d 809, 811-812 (9th Cir.), cert. denied, 493 U.S. 895 (1989). Other courts of appeals, invoking their supervisory authority as an aid to appellate review, require sentencing courts to make specific findings of fact on the record respecting the Section 3664(a) factors, including the defendant's ability to pay the proposed amount. See, *e.g.*, *United States* v. *Owens*, 901 F.2d 1457, 1459-1460 (8th Cir. 1990); *United States* v. *Bruchey*, 810 F.2d at 459; *United States* v. *Palma*, 760 F.2d 475, 480 (3d Cir. 1985); *United States* v. *Hill*, 798 F.2d 402, 406-407 (10th Cir. 1986). No court of appeals, however, has held that the statute itself requires trial courts to make findings of fact concerning the defendant's ability to pay. See, *e.g.*, *United States* v. *Morrison*, 938 F.2d 168, 171-172 (10th Cir. 1991); *United States* v. *Ryan*, 874 F.2d 1052, 1053 (5th Cir. 1989); *United States* v. *Mahoney*, 859 F.2d 47, 49-50 (7th Cir. 1988); *United States* v. *Bruchey*, 810 F.2d at 458; *United States* v. *Palma*, 760 F.2d at 480.

Thus, petitioner's claim of conflict among the courts of appeals simply reflects the different methods the courts have chosen to ensure that the record in a restitution proceeding provides an adequate basis for review under the abuse-of-discretion standard. There is no need for this Court to mandate a specific method for all the courts of appeals to follow in discharging their reviewing function, so long as they all continue to perform that function effectively and under the same governing standard.

2. There is no merit to petitioner's argument (Pet. 26-29) that the $5 million restitution order in this case is unlawful because of petitioner's inability to pay it. Under the VWPA, the defendant bears the burden of demonstrating that he is unable to pay a proposed amount of restitution. 18 U.S.C. 3664(d). See *United*

States v. *St. Gelais*, 952 F.2d 90, 98 (5th Cir.), cert. denied, 113 S. Ct. 439 (1992); *United States* v. *Purther*, 823 F.2d at 970; *United States* v. *Morrison*, 938 F.2d at 172. See also *United States* v. *Rivera*, 971 F.2d 876, 895 (2d Cir. 1992), cited at Pet. 25 ("A defendant seeking to avoid a [Sentencing] Guidelines fine on the basis of inability to pay must come forward with evidence of that financial inability."). Contrary to petitioner's assertion (Pet. 26), he failed to carry the burden of "substantiating [his] claim that he could not possibly repay the $5 million award." There was evidence in the record that petitioner had at his disposal business assets of considerable value. Pet. App. 6a. As the district court noted, petitioner's business assets had "never been clearly identified and valued by [petitioner]." *Ibid.* The court of appeals remarked that the district judge's difficulties in setting an appropriate amount of restitution were largely attributable to "the uncertainties [petitioner] himself had created concerning the true state of his current finances." *Id.* at 10a. By declining to offer a complete picture of his financial affairs—and, in particular, to show to what extent his business assets were available to pay his restitution—petitioner failed to carry his statutory burden of demonstrating his inability to pay under the VWPA. In the absence of other evidence in the record definitively establishing that the award was excessive, the district court did not abuse its discretion by awarding restitution in the full amount of the victim's loss. See *United States* v. *St. Gelais*, 952 F.2d at 98 (court "had no choice but to impose full restitution" where defendant refused to provide information concerning his financial holdings).[2]

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[2] This case does not present the question (see Pet. 26-29) whether an award of restitution is improper if the record establishes that the defendant is unable, and is unlikely to become able,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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to pay the full amount of the restitution award. Compare *United States* v. *Clark*, 901 F.2d 855 (10th Cir. 1990) (defendant provided financial information that met his burden of proving inability to pay restitution award); *United States* v. *West*, 942 F.2d 528 (8th Cir. 1991) (record clearly established defendant's inability to pay restitution amount). Although the district judge did state, at one point, that he "realize[d] the defendant can never repay the total restitution," see Pet. App. 6a, the court of appeals interpreted the district court's opinion as a whole to reflect uncertainty about petitioner's ability to pay, which was in turn the result of his refusal to clarify his financial situation. Under the VWPA, that uncertainty must be resolved against the defendant and in favor of the victims.